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TENAGA NASIONAL BERHAD

v.

MAJLIS MESYUARAT KERAJAAN NEGERI SELANGOR & ORS

B

HIGH COURT MALAYA, SHAH ALAM
VERNON ONG J
[JUDICIAL REVIEW NO: 25-57-2011]
5 MARCH 2014

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ADMINISTRATIVE LAW: *Exercise of administrative powers - Jurisdiction - State Authority - Appeal provisions under ss. 11(7) and 16(2) of the Electricity Supply Act 1990 - Whether provided for appeal procedure - Whether State Authority misdirected in law - Whether acted*
D *within jurisdiction*

ADMINISTRATIVE LAW: *Remedies - Certiorari - Power of Tenaga National Bhd to enter land for purposes of construction - State Authority suggested for land to be acquired under Land Acquisition Act 1960 - Whether State Authority acted within jurisdiction - Electricity Supply Act*
E *1990, ss. 11, 13 & 16(2)*

The applicant ('TNB'), proposed to commence a project to upgrade its transmission lines and notified the second respondent, the Director of Land and Mines of the State of Selangor, of its
F intention. The lands affected by the project include lands owned by the fifth and sixth respondents ('the land') and hence, TNB notified the fifth and sixth respondents of its intention. Subsequently, an enquiry to determine compensation to be awarded was held by the third respondent, the District Land
G Administrator ('DLA') pursuant to s. 16(1) of the Electricity Supply Act 1990 ('ESA'). However, the fifth defendant was dissatisfied with the award and lodged an appeal to the first respondent ('State Authority') under s. 16(2) of the ESA. TNB was subsequently informed by the fourth respondent, Kuala Langat
H District Officer, that the State Authority had rejected the fifth and sixth respondents' appeal on the objection against the amount of compensation but had approved the suggestion for the lands to be acquired under the Land Acquisition Act 1960 ('LAA'). Hence, the application for judicial review, challenging the impugned
I decision on the grounds, *inter alia*, (i) the first to fourth

respondents had no power/jurisdiction to order TNB to acquire the lands under the LAA; (ii) the first to fourth respondents failed to consider the irrefutable fact that the fifth and sixth respondents had accepted TNB's payment for compensation; and (iii) the impugned decision was arrived at without TNB being given the opportunity to make any representations against the fifth and sixth respondents' appeal.

Held (allowing application for *certiorari*; quashing decision of State Authority):

(1) A party may appeal to the State Authority, *inter alia*, against an order of the DLA on the intended acts of the licensee on the land and against the amount of compensation payable under ss. 11 or 13 assessed by the DLA. The appeal provisions under ss. 11(7) and 16(2) of the ESA indicate that the appeal process is summary in nature and hence, there is no prescribed procedure. Given that the appeal process is summary in nature, and there is no provision for TNB to be heard and that the decision of the State Authority is a state secret, TNB's argument that the impugned decision was arrived at without TNB being given the opportunity to make any representations against the fifth and sixth respondents' appeal was unsustainable. (paras 19, 20 & 22)

(2) TNB was well aware that there was an appeal to the State Authority and that the decision of the State Authority was pending when the compensation was paid to the fifth respondent. The payment of compensation was not qualified, in that, there was nothing to tie the fifth respondent to the fact that if the compensation was accepted, the fifth respondent had abandoned the appeal. TNB had also not satisfied the court that the fifth and sixth respondents ought to have rejected the compensation pending the appeal. Accordingly, there was nothing to estop the fifth respondent from pursuing with the appeal with the State Authority. (para 25)

(3) The State Authority was only seized of jurisdiction to decide on appeal in respect of the compensation and was not competent to decide on the issue of entering on the land for the purpose of compensation. The only issue of the appeal was the amount of compensation and hence, the State

Authority had misdirected itself in law when it determined that s. 11 was applicable and s. 13 was no longer sustainable on the basis that there were extensive works on the land. The fact that there may well be extensive works on the land was not a relevant or material factor in assessing the issue of compensation. In taking into account the extraneous factors, the State Authority had committed an error of law. (paras 29 & 30)

(4) The State Authority in determining an appeal under s. 16(2) on the amount of compensation did not have the power to make any order or to direct TNB to acquire the land. In making such order, the State Authority had acted in error of jurisdiction. Such an order or direction was *ultra vires* the State Authority in the appeal. In the circumstances, the decision making process was tainted with errors of law and errors of jurisdiction and thus, an order of *certiorari* was issued to quash the State Authority's decision. (paras 31 & 32)

Case(s) referred to:

B Surinder Singh Kanda v. The Government of The Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Fairmount Investments Ltd v. Secretary of State For The Environment [1976] 2 All ER 865 ***(refd)***

Ismail Abdullah v. Tenaga Nasional Bhd [2011] 3 CLJ 770 CA ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, ss. 10, 11(7), (8), 13, 16(1), (2)
Rules of the High Court 1980, O. 14

For the applicant - Hadi Mukhlis; M/s Shook Lin & Bok
For the 1st - 4th respondents - Ahmad Fuad Othman; State Legal Advisor
For the 5th & 6th respondents - Mohd Izral Khairy; M/s Izral Partnership

Reported by S Barathi

JUDGMENT

Vernon Ong J:

[1] This application for judicial review relates to a decision of the first to fourth respondents of 16 February 2011 which, *inter alia*, ordered the applicant to acquire the lands under the Land Acquisition Act 1960 (LAA 1960).

Brief Account Of The Salient Facts

[2] The applicant ('TNB') is the national utility company in the business of, *inter alia*, generating, transmitting and distributing electricity supply to various end users nationwide; and is a licensee under the Electricity Supply Act 1990 (ESA 1990).

[3] The first respondent is the State Authority stipulated under s. 16(2) of ESA 1990. The second to fourth respondents are the Director of Land and Mines of the State of Selangor, Kuala Langat District Land Administrator and Kuala Langat District Officer respectively.

[4] The fifth and sixth respondents are at all material times the owners of the lands known as Lot 7091 (Old Lot No. 555) GRN 27284, and No. Lot 44521 (PT 28453) (Old Lot No. 7053) GRN 234139, both in Mukim Tanjong Dua Belas, Daerah Kuala Langat (jointly referred to as 'the lands').

[5] Around April 2007, TNB proposed to commence a project to upgrade its transmission lines to the 132 kV transmission lines from PMU Olak Lempit to PMU Banting ('the project').

[6] TNB notified the second respondent of its intention to carry out the project *vide* a letter dated 13 April 2007.

[7] The lands affected by the project include, *inter alia*, the lands.

[8] TNB notified the fifth and sixth respondents of its intention to commence the project *vide* letters dated 30 April 2009.

[9] Subsequently, an enquiry to determine compensation was held by the third respondent pursuant to s. 16(1) ESA 1990. Both the fifth and sixth respondents were also notified to attend the enquiry.

[10] At the enquiry which took place on 27 May 2009, the third respondent awarded compensation of RM1,670,127.

[11] Dissatisfied with the award, the fifth respondent lodged an appeal to the State Authority (first respondent) under s. 16(2) ESA 1990. The fifth respondent's appeal is premised on three main grounds:

(i) that the lands be acquired under the LAA 1960;

(ii) that the lands be assessed in accordance with the valuation of CH Williams Talhar & Wong which had assessed the lands to be at RM4.50 psf as opposed to the applicant's assessment at RM3.25 psf; and

(iii) that the assessment be based on 100% of the lands as opposed to 40%.

[12] By a letter dated 18 March 2011, the fourth respondent informed TNB that the State Authority had at its meeting on 16 February 2011:

(a) rejected the fifth and sixth respondent's appeal on the objection against the amount of compensation; and

(b) approved the suggestion for the lands to be acquired under the LAA 1960.

('the impugned decision').

Applicant's Case

[13] Briefly, the impugned decision is challenged on three main grounds of errors of law and jurisdiction:

(a) The first to fourth respondents have no power/jurisdiction to order TNB to acquire the lands under the LAA 1960;

(b) The first to fourth respondents failed to consider the irrefutable fact that the fifth and sixth respondents had accepted TNB's payment for compensation as awarded by the third respondent before making the impugned decision; and

(c) The impugned decision was arrived at without TNB being given the opportunity to make any representations against the fifth and sixth respondent's appeal.

Findings Of The Court

[14] It is common ground that TNB is empowered to enter on land in the exercise of its powers under ESA 1990. More specifically, ESA 1990 provides for a number of situations under which such power of entry on land may be exercised.

[15] For instance, TNB is empowered to enter on and examine land to ascertain the suitability of the land for the purposes of construction of an installation or part of an installation (s. 10).

[16] In this instance the more pertinent provisions are those that relate to TNB's power to enter on land for the purposes of construction (s. 11) and for undertaking works relating to maintenance, repair and upgrading of installation (s. 13). Section 16 relates to the issue of compensation. As ss. 11, 13 and 16 are pertinent, they are reproduced below:

> 11. Power to enter on land for purposes of construction
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> (1) Subject to as hereinafter provided, whenever it is necessary so to do for the purposes of installing any system of distribution of electricity under this Act, a licensee may lay, place or carry on, under or over any land, other than State land, such post and other equipment as may be necessary or proper for the purposes of the licensed installation, as the case may be, and may take such other action as may be necessary to render the installation safe and efficient, paying full compensation in accordance with section 16 to all persons interested for any disturbance, damage or disability that may be caused thereby and such compensation may include an annual payment for land used for the purpose of the posts or other equipment.
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> (2) Before entering on any land for the purpose specified in subsection (1), the licensee shall give a notice stating as fully and accurately as possible the nature and extent of the acts intended to be done. The notice shall be substantially in the form set out in the First Schedule and the District Land Administrator shall specify a date upon which the State Authority shall inquire into any objections that may have been made as hereinafter provided.
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> (3) The aforesaid notice shall be given:
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> (a) in the case of alienated land, to the owner or occupier;
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> (b) in the case of reserved land, to the officer or any other person in charge of the reserved land or, in the absence of any such officer or person, to the District Land Administrator,
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> and may be sent by registered post or be left at the usual or lase known place of abode of the person to whom it is to be given or served by the licensee or the District Land Administrator at the expense of the licensee, either in the manner hereinbefore provided or in

A the manner provided for the service of notices by any written law relating to land in force in the State where the land is situated.

(4) Any of the persons mentioned in subsection (3) may, within fourteen days of the receipt of the notice therein B referred to, lodge an objection to the intended acts of the licensee. The objection may be made to the District Land Administrator, either verbally or in writing, and the District Land Administrator shall give notice of the objection to the State Authority and to the licensee.

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(5) If no objection is lodged within the time limited for that purpose by subsection (4), the licensee may forthwith enter on the land and do all or any of the acts specified in the notice given under subsection (2).

D (6) If an objection is lodged and is not withdrawn before the date fixed for the hearing thereof, the District Land Administrator shall hold an enquiry, giving all parties an opportunity to be heard.

(7) Upon the conclusion of the enquiry the District Land E Administrator may either unconditionally or subject to such terms, conditions and stipulations as he thinks fit, make an order authorizing or prohibiting any of the acts mentioned in the notice given under subsection (2). The order shall be substantially in the form set out in the Second Schedule:

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Provided that any party who is dissatisfied with the District Land Administrator's order may within twenty-one days after the order appeal against such order to the State Authority which may then uphold, set aside or vary the order upon such terms, conditions and stipulations as G it thinks fit.

(8) The State Authority may, if it thinks fit, *in lieu* of making an order under subsection (7), direct the acquisition of any land or part of any land in a notice H given under subsection (2).

(9) The decision of the State Authority under this section shall be final.

(10) Notwithstanding any written law relating to land matters; I the Registrar:

(a) upon the production to him of the notice issued by the licensee under subsection (2) together with the statement by the District Land Administrator that no objection had been lodged by any of the persons mentioned in subsection (3); or

(b) upon the production to him of the original order made under subsection (7) and upon the deposit with him of a certified copy of such order,

shall cause to be made on the register document of title relating to the land affected by the notice or order as the case may be, a note of the existence of the rights under such notice or order.

13. Maintenance, repair and upgrading of installation

Whenever it is necessary so to do for the purpose of maintaining, repairing or upgrading any licensed installation or any part thereof, the licensee, or any person authorized by him in that behalf, may at all reasonable times enter upon any land on, under or over which supply lines have been laid, placed or carried, or upon which posts or other equipment have been erected, and may carry out all necessary repairs, and may, in the course thereof, fell or lop trees, remove vegetation and do all other things necessary to the said purpose, causing as little damage as possible and paying full compensation in accordance with section 16 to all persons interested for any damage that may be caused thereby for which compensation had not already been assessed under section 11.

16. Compensation

(1) The amount of compensation, if any, payable under section 11 or 13 shall be assessed by the District Land Administrator after such enquiry as he shall deem sufficient. The assessment shall be substantially in the form set out in the Third Schedule:

Provided further that no compensation shall be payable by the licensee in respect of any tree within fifty feet of the centre line of any road constructed or maintained by the State Government or by any local authority unless it is proved that the tree was in existence prior to the construction of the road.

(2) Any person aggrieved with the District Land Administrator's assessment may within twenty-one days after the assessment appeal to the State Authority whose decision shall be final.

Whether The Impugned Decision Was Made In Error Or Law And Error Of Jurisdiction When The Fifth Respondent's Appeal Was Heard Without According TNB The Right To Make Any Representations?

[17] On the this issue, learned counsel for the applicant submitted that the impugned decision was in breach of the basic principles of natural justice as the respondents failed to accord to TNB the right to be heard at the appeal (*B Surinder Singh Kanda v. The Government of The Federation of Malaya* [1962] 1 LNS 14; [1962] MLJ 169 PC; *Fairmount Investments Ltd v. Secretary of State For The Environment* [1976] 2 All ER 865).

[18] In the context of the particular facts of this case, it is pertinent to note that there are essentially two types of appeal a party may make to the State Authority against the decision of the DLA.

[19] The first type relates to an appeal against an order of the DLA on the intended acts of the licensee on the land (s. 11(7)). The second type relates to an appeal against the amount of compensation payable under ss. 11 or 13 assessed by the DLA (s. 16(1) ESA 1990).

[20] Subsections (7) and (8) of s. 11 states that "… to the State Authority which may then uphold, set aside or vary the order upon such terms, conditions and stipulations as it thinks fit' (sub-s. (7)), and "The State Authority may, if it thinks fit, *in lieu* of making an order under sub-s. (7), direct the acquisition of any land or part of any land in a notice given under sub-s. (2)". A reading of the appeal provisions in ss. 11(7) and 16(2) indicate that the appeal process is summary in nature. There is no prescribed appeals procedure. The natural and ordinary meaning of the words "as/if it thinks fit" in the subsections must be construed to mean that the State Authority is vested with a wide discretion.

[21] In *Ismail Abdullah v. Tenaga Nasional Bhd* [2011] 3 CLJ 770 CA, TNB entered into the appellant's land. Compensation was ordered by the district land administrator to be paid to the appellant under s. 16 ESA 1990. Dissatisfied, TNB appealed to the state authority against the sums awarded. The state authority

increased the amount of compensation. TNB refused to pay the revised sum ordered and the appellant sued and obtained summary judgment under O. 14 RHC 1980. The summary judgment was set aside on appeal to the High Court. On appeal the Court of Appeal held that the compensation as reviewed and awarded by the State Authority on appeal from the award of the district land administrator was final and unappealable. This was clear from the mandatory words "shall be final" in s. 16(2) ESA 1990. The state Executive Council had acted as the State Authority and its decision was a state secret. Accordingly, the Court of Appeal held that there were no triable issues raised by the respondent and summary judgment under O. 14 of the Rules of the High Court 1980 was duly recorded against TNB.

[22] Given that the appeal process is summary in nature, that there is no provision for TNB to be heard and that the decision of the State Authority is a state secret, the court finds that TNB's argument is unsustainable. Accordingly, the question is answered in the negative.

Whether The Respondents Failed To Consider The Irrefutable Fact That The Fifth And Sixth Respondents Had Accepted TNB's Payment For Compensation As Awarded By The Third Respondent Before Making The Impugned Decision?

[23] At all material times TNB was well aware that there was an appeal to the State Authority and that the decision of the State Authority was pending when the compensation was paid to the fifth respondent.

[24] The payment of compensation was not qualified; there was nothing to tie the fifth respondent to the fact that if the compensation was accepted, then the fifth respondent had abandoned the appeal.

[25] At any rate, TNB has not satisfied the court that the fifth and sixth respondents ought to have rejected the compensation pending the appeal. Accordingly, there is nothing to estop the fifth respondent from pursuing with the appeal with the State Authority. Therefore, the question is also answered in the negative.

Whether The First To Fourth Respondents Have The Power/Jurisdiction To Order TNB To Acquire The Land Under The LAA 1960?

[26] The crux of the challenge depends on whether the State Authority was correct in basing its decision on the premise that the works that TNB intended to carry out under the project were in fact construction works which came under s. 11 and not maintenance, repair and upgrading of installation works under s. 13.

[27] It is pertinent to note that the fifth respondent's appeal to the SA was made under s. 16(2) ESA 1990. An appeal under s. 16 is an appeal against the District Land Administrator's assessment of the amount of compensation. The fifth respondent's appeal to the State Authority is contained in a letter dated 2 June 2009. It refers to the DLA's assessment of the amount of compensation.

[28] It is noted that one of the grounds the fifth respondent adopted is that the land be acquired by TNB under the LAA 1960. Did this change the character of the appeal from being an appeal against the amount of compensation payable under s. 11 or 13 assessed by the DLA into an appeal against an order of the DLA on the intended acts of the licensee on the land (s. 11(7))? Was the State Authority correct in law to have considered that land acquisition ground and direct the acquisition of the land pursuant to sub-s. (8) of s. 11?

[29] The court agrees with the submission of learned counsel for TNB that the powers of State Authority to determine any appeal is limited to the provisions of s. 16(2) read with s. 13 ESA 1990. The State Authority was only seized of jurisdiction to decide on the appeal in respect of the compensation. It was not competent to decide on the issue of entering on the land for the purposes of construction. The latter was not the subject of the appeal; the amount of compensation assessed by the DLA was the only issue of the appeal.

[30] The State Authority had misdirected itself in law when it determined that s. 11 was applicable and s. 13 was no longer sustainable on the basis that as there were extensive works on the land. The fact that there may well be extensive works on the land is not a relevant or material factor in assessing the issue of compensation. In taking into account these extraneous factors, the State Authority had committed an error or law.

[31] It is also noted that the State Authority in determining an appeal under s. 16(2) on the amount of compensation did not have the power to make any order or to direct TNB to acquire the land. In making such order the State Authority had acted in error of jurisdiction. Clearly, such an order or direction is *ultra vires* the State Authority in this appeal.

[32] For the foregoing reasons, the court is satisfied that the decision making process is tainted with error of law and error of jurisdiction – procedural impropriety and illegality. Accordingly, the court is constrained to issue an order of *certiorari* to quash the decision of the State Authority and consequential relief. Costs of the application to the applicant.